IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

JAMES THOMAS	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. N19C-11-041 EMD CCLD
	)	
HEADLANDS TECH PRINCIPAL HOLDINGS, L.P., formerly known as Headlands Principal Holdings, LP, a Delaware Limited Partnership,	)	
	)	
Defendant.	)	

Submitted: May 28, 2020
Decided: September 22, 2020

Upon Defendant Headlands Tech Principal Holdings LP's Motion to Dismiss
GRANTED in part and DENIED in part

Joel Friedlander, Esquire, Christopher M. Foulds, Esquire, Friedlander & Gorris, P.A., Wilmington, Delaware and Max B. Chester, Esquire, Aaron R. Wegrzyn, Esquire, Foley & Lardner LLP, Milwaukee, Wisconsin. *Attorneys for Plaintiff James Thomas*

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DAVIS, J.

I. INTRODUCTION[1]

This is a breach of contract action assigned to the Complex Commercial Litigation Division of this Court. Plaintiff James Thomas brings this action against Defendant Headlands

[1] The Court issued this Opinion under seal on September 22, 2020. The Court sent a notice to unseal (the "Notice") on September 22, 2020. In the Notice, the Court stated that, under Civil Rule 5(g)(4), it would unseal the opinion unless, within seven days, a party sets forth grounds for continued restriction and requests a judicial determination on whether good cause exists to keep matters under seal. The parties filed a written request which the Court has reviewed and determined states good cause to keep portions of the Opinion under seal. This is the redacted Opinion. ***Redacted portions are noted with either "[redacted]" or "NONPARTY" designation.***

Tech Principal Holdings, LP, formerly known as Headlands Principal Holdings, LP ("Principal Holdings"). On November 6, 2019, Mr. Thomas filed his Complaint against Principal Holdings. The Complaint contains two causes of action: (i) breach of a voluntary repurchase, separation and release agreement dated April 30, 2014 ("Separation Agreement") (Count I); and (ii) breach of an implied covenant of good faith and fair dealing (Count II). Count II is plead in the alternative.

On December 20, 2019, Principal Holdings filed its Motion to Dismiss (the "Motion"). On January 27, 2020, Mr. Thomas filed his Opposition to Defendant's Motion to Dismiss (the "Opposition"). The Court held a hearing on the Motion and the Opposition on May 28, 2020. For the reasons set forth below, the Court holds that Mr. Thomas has failed to state a claim in Count I, but has adequately plead a claim in Count II. As such, the Court will **GRANT** in part and **DENY** in part the Motion.

II. RELEVANT FACTS[2]

Mr. Thomas is a resident and citizen of the State of California. Principal Holdings is a Delaware limited partnership with its principal place of business in Chicago, Illinois. Principal Holdings' general partner is Headlands Tech Principal Holdings GP, LLC, formerly known as Headlands Principal Holdings GP, LLC ("Principal GP"), a Delaware limited liability company with its principal place of business in Chicago, Illinois. The current members of Principal GP are Jason Lehman, Matthew Andresen, and Neil Fitzpatrick. Principal Holdings' current limited partners are Lehman, Andresen, Fitzpatrick, and Headlands Tech Holdings, LLC, formerly known as Headlands Holdings, LLC ("Holdings LLC").

[2] Unless otherwise indicated, the following are the facts as alleged in the Complaint. For purposes of the Motion, the Court must view all well-pleaded facts alleged in the Complaint as true and in a light most favorable to the Plaintiff. *See, e.g., Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 27 A.3d 531, 536 (Del. 2011); *Doe v. Cedars Acad., LLC*, 2010 WL 5825343, at *3 (Del. Super. Oct. 27, 2010).

Mr. Thomas founded a quantitative trading firm in San Francisco, California in 2010, along with Mr. Lehman, Mr. Andresen, and Mr. Fitzpatrick.[3] The firm comprised several affiliated entities, including Headlands Tech Organization, LLC, formerly known as Headlands Organization, LLC ("Organization LLC"); Holdings, LLC; Headlands Technologies LLC ("Technologies LLC"); Principal Holdings; and Principal GP (collectively, the "Company").[4] When setting up the Company, Mr. Thomas became a limited partner of Principal Holdings and a member of Principal GP, receiving certain equity units in each entity.[5]

In 2013, Principal Holdings admitted William Sterling as a new limited partner.[6] The [REDACTED as confidential hereafter "NONPARTY"], Principal Holdings, Mr. Lehman, Mr. Andresen, Mr. Fitzpatrick, and Mr. Thomas executed a restricted unit agreement dated October 10, 2013 (the "RUA").[7] Under RUA Section 1(a), the NONPARTY received Class A and Class C units in Principal Holdings directly from Principal Holdings.[8] Under RUA Section 2(a), the NONPARTY agreed to purchase Class D units in Principal Holdings from Mr. Lehman, Mr. Andresen, Mr. Fitzpatrick, and Mr. Thomas.[9] RUA Section 2(b) provided that the closings on the NONPARTY's purchases of Class D units in Principal Holdings from Mr. Lehman, Mr. Andresen, Mr. Fitzpatrick, and Mr. Thomas would occur upon any distributions of Net Cash Flow and/or Net Capital Proceeds made by Principal Holdings to the NONPARTY.[10] The number of units purchased at each closing would be in proportion to the size of the distribution made by Principal Holdings to the NONPARTY.[11]

[3] Compl. at ¶ 3.
[4] *Id*.
[5] *Id*. at ¶ 4.
[6] *Id*. at ¶ 6.
[7] *Id*. at ¶ 7.
[8] *Id*. at ¶ 8.
[9] *Id*. at ¶ 9.
[10] *Id*. at ¶ 10.
[11] *Id*.

Under the definition of "Acquisition Period" in RUA Section 2(e), the NONPARTY lost the right to purchase any Class D units in Principal Holdings upon the end of Mr. Sterling's employment with the Company (or whenever Mr. Sterling ceased to devote substantially all of his professional time to Holdings LLC).[12]

In 2014, Mr. Thomas and the Company agreed that Mr. Thomas would separate from the Company and withdraw as a limited partner of Principal Holdings, and as a member of Principal GP.[13] At the time of Mr. Thomas' separation from the Company, the NONPARTY had not yet purchased any of Mr. Thomas' Class D units in Principal Holdings under the RUA.[14]

Mr. Thomas and the Company entered into the Separation Agreement on or about April 30, 2014.[15] In Separation Agreement Section 2(a), Mr. Thomas and the Company contracted for Mr. Thomas to sell to Principal Holdings all of Mr. Thomas' limited partnership interests in Principal Holdings ("LP Interests")—including all of his Class D units—in exchange for an aggregate purchase price of $[redacted], increased at a rate of interest specified in Separation Section 2(b) ("LP Interests Purchase Price").[16] Mr. Thomas and the Company also decided that Principal Holdings would pay the LP Interests Purchase Price in two installments to Mr. Thomas.[17] The parties agreed that Principal Holdings would pay Mr. Thomas a first installment in the amount of $[redacted], increased at a rate of interest specified in Separation Agreement Section 2(b) ("Direct Payment Amount"), and that Principal Holdings would do so no later than April 30, 2017.[18]

[12] *Id*. at ¶ 12.
[13] *Id*. at ¶ 13.
[14] *Id*. at ¶ 14.
[15] *Id*. Ex. B, at 1.
[16] *Id*. Ex. B, Section 2(a).
[17] *Id*. at ¶ 17.
[18] *Id*. at ¶ 18.

Mr. Thomas and the Company provided that Principal Holdings would pay Mr. Thomas a second installment in the amount of $[redacted], increased at a rate of interest specified in Separation Agreement Section 2(b) ("Indirect Payment Amount"). Section 2(a) provides that the Indirect Payment was to be made within three business days after any payment became due from the NONPARTY to Principal Holdings under the RUA for Class D units in Principal Holdings that were previously owned by Mr. Thomas.[19]

The exact language of Separation Section 2(a) provides:

> Redemption of Interests
>
> (a) Thomas hereby sells, assigns, transfers and surrenders to Principal Holdings, and Principal Holdings hereby acquires, repurchases and redeems from Thomas, all of the limited partnership interests in Principal Holdings beneficially owned by Thomas (the "**LP Interests**"). Principal Holdings and Thomas hereby acknowledge and agree that, subject to **Section 19**, the aggregate purchase price for the LP Interests is $[redacted], as increased pursuant to Section 2(b) (the "**LP Interests Purchase Price**"), which amount shall be paid as set forth in this **Section 2(a), Section 2(h) and Section 3**. $[redacted], as increased pursuant to **Section 2(b)** (the "**Direct Payment Amount**"), of the LP Interests Purchase Price shall be paid by Principal Holdings on or before the thirty-six (36) month anniversary of the Separation Date; provided, however, that, if at any quarter-end commencing on June 30, 2014, and which quarter-end is prior to such anniversary date, Principal Holdings has available Adjusted Net Cash Flow (as defined in **Section 2(d)**) for the quarter ending on such date, as determined in good faith by the General Partner, Principal Holdings shall pay to Thomas an amount of cash equal to the lesser of (x) such available Adjusted Net Cash Flow and (y) the outstanding balance of the Direct Payment Amount, within ten (10) day of the applicable quarter end. $[redacted], as increased pursuant to **Section 2(b)** (the "**Indirect Payment Amount**"), of the LP Interests Purchase Price shall be paid by Principal Holdings within three (3) Business Days after any payment is due to Principal Holdings from the **NONPARTY** pursuant to Section 2(d)(ii) of that certain Restricted Unit Agreement, dated as of October 10, 2013, by and among NONPARTY, Principal Holdings, Jason Lehman, Matthew F. Andersen, Neil M. Fitzpatrick and Thomas (the "**Restricted Unit Agreement**"), with respect to the Purchased Units (as defined under the Restricted Unit Agreement) of Thomas unable to be purchased by NONPARTY from Thomas as a result of Principal Holdings' repurchase of the LP Interests under the Agreement. Amounts paid under this Section 2(a), Section 2(h) or Section 3 shall be paid via wire transfer to the bank account set forth on Exhibit A or to such other account designated in writing by Thomas to Principal

[19] *Id*. at ¶ 19; Ex. B, Section 2(a).

> Holdings. No later than three (3) Business Days after a payment is due under this Section 2(a), Principal Holdings shall provide Thomas with reasonable supporting documentation for Principal Holdings' determination of the amount of such payment, including Principal Holdings' determination of Adjusted Net Cash Flow, and Principal Holdings shall promptly provide Thomas with any additional supporting documentation that he reasonably requests.[20]

Separation Agreement Section 2(h) also addresses payment of the Indirect Payment Amount.[21] Section 2(h) states in pertinent part the following:

> In the event that a Sale of the Partnership is consummated at a time when the LP Interests Purchase Price has not been fully paid, then (I) if the assets or equity sold in such transaction constitute 75% or more of all of the Partnership's assets or equity, respectively, as determined by the General Partner in good faith, Principal Holdings shall pay to Thomas the full remaining amount of the LP Interests Purchase Price, or (II) if the assets or equity sold in such transaction constitute more than 50% but less than 75% of all of the Partnership's assets or equity, respectively, as determined by the General partner in good faith, Principal Holdings shall pay to Thomas a portion of the Net Capital Proceeds from such transaction in an amount equal to the lesser of (A) the amount of Net Capital Proceeds to which Thomas would have been entitled had Thomas remained the owner of the LP Interests as of the date of such transaction, as determined by the General Partner in good faith, and (B) the full remaining amount of the LP Interests Purchase Price. Any amounts payable to Thomas pursuant to this **Section 2(h)** shall be paid by Principal Holdings within thirty (30) days following the consummation of the Sale of the Partnership . . .[22]

The Separation Agreement provides for the payment of interest on Direct Payment Amount and the Indirect Payment Amount.[23] The "outstanding amount of the Indirect Payment Amount will bear interest as provided under the [RUA]."[24] The RUA provides for interest at RUA Section 2(e)(vi)(y).[25]

Mr. Thomas and the Company executed an amendment to the Separation Agreement dated January 20, 2015 ("Amendment No. 1").[26] In Amendment No. 1, Mr. Thomas and the

[20] *Id*. Ex. B, Section 2(a).
[21] *Id*. Ex. B, Section 2(h).
[22] Id.
[23] *Id*. Ex. B, Section 2(b).
[24] *Id*.
[25] *Id*. Ex. A, Section 2(e).
[26] *Id*. at ¶ 21; Ex. C.

Company agreed to decrease the principal amount of the LP Interests Purchase Price from $[redacted] to $[redacted] and to decrease the Direct Payment Amount from $[redacted] to $[redacted].[27]

In 2015, Mr. Sterling left his employment with the Company, thereby ending the NONPARTY's opportunity to purchase Class D units in Principal Holdings under the RUA.[28] Under the RUA, the Acquisition Period ended when Mr. Sterling departed from the Company.[29] The NONPARTY therefore never purchased any Class D units in Principal Holdings under the RUA. Mr. Sterling's departure from the Company meant that the payment term for the Indirect Payment Amount as provided in Separation Agreement Section 2(a) would not occur because the NONPARTY would not be making a payment under RUA Section 2(d)(ii). [30]

On January 29, 2016, Principal Holdings paid Mr. Thomas the Direct Payment Amount.[31] Despite Mr. Sterling having already left the Company, the Complaint is silent on any communication between the parties between January 29, 2016 and February 13, 2017. On February 13, 2017, Mr. Thomas directed Principal Holdings to pay the Indirect Payment Amount, believing payment would have been due at that time if Mr. Sterling had not departed from the Company.[32] On February 27, 2017, Principal Holding rejected Mr. Thomas' demand for payment of the Indirect Payment Amount. [33] Principal Holdings noted that payment was due only when either: (i) the NONPARTY paid Principal Holdings under RUA Section 2(d)(ii), or (ii) the Company was sold. [34] On October 2, 2019, Mr. Thomas sent a letter demanding payment

[27] *Id*. Ex. C, Section 1(a).
[28] *Id*. at ¶ 23.
[29] *Id*. at ¶ 24.
[30] *Id*. Ex. B, Section 2(a).
[31] *Id*. at ¶ 25.
[32] *Id*. at ¶ 26.
[33] *Id*. at ¶ 27.
[34] *Id*.

of the Indirect Payment Amount to Principal Holdings.[35] Principal Holdings has not paid Mr. Thomas the Indirect Payment Amount.[36]

Mr. Thomas believes the Indirect Payment Amount is essentially payment for the Class D Units that Mr. Thomas lost in the separation. Principal Holdings contends that the Class D Units "provided the Partners, including Thomas, a form of illiquid equity interest in the Partnership that entitled the holder to a potential future payment following certain defined events."[37]

III. PARTIES' CONTENTIONS

A. MOTION

First, Principal Holdings contends that it did not breach the Separation Agreement because neither condition to payment of the Indirect Payment Amount has been satisfied. Principal Holdings relies on the plain language in the Separation Agreement which provides that payment of the Indirect Payment Amount is due only after the contractual condition has been satisfied. Principal Holdings argues that the language of Separation Agreement Section 2(a) is unambiguous and conditional. Principal Holdings further contends that the impossibility of payment under Separation Agreement Section 2(a) does not justify reformation of the Separation Agreement. Principal Holdings claims that payment under the RUA was material to the Separation Agreement. Principal Holding also notes that Mr. Thomas will not suffer forfeiture under the Separation Agreement because he will recover the Indirect Payment Amount upon the sale of Headlands Tech Principal Holdings pursuant to Separation Agreement Section 2(h). Second, Principal Holdings contends it did not breach the implied covenant of good faith and fair

[35] *Id*. at ¶ 28.
[36] *Id*. at ¶ 29.
[37] Motion at 4.

dealing. Third, Principal Holdings argues that Mr. Thomas's claims are barred by their respective statutes of limitations.

B. OPPOSITION

Mr. Thomas opposes the Motion. Mr. Thomas contends that there are no conditions to Principal Holding's obligation to pay Mr. Thomas the Indirect Payment Amount. Mr. Thomas argues that Delaware law disfavors conditions precedent that withhold payment and could cause forfeiture. Mr. Thomas further asserts that the parties did not use express language to condition payment so Separation Agreement Section 2(a) is a payment term rather than a condition precedent. Mr. Thomas next claims that the Court should apply Delaware's "reasonable time" rule because of the impossibility of Separation Agreement Section 2(a)'s payment term. Mr. Thomas argues that the acceleration clause provided in Section 2(h) is irrelevant and that the reasonable time gap-filler should be used for the payment term. Mr. Thomas then contends that, even if the Court accepts Principal Holdings' interpretation, the Court should excuse the failure of the alleged condition as immaterial. In addition, Mr. Thomas claims that Principal Holdings' interpretation creates a dispute about the parties' intent. Mr. Thomas asserts that if the contract claim fails that, in the alternative, he has plead a proper claim for breach of the implied covenant of good faith and fair dealing. Lastly, Mr. Thomas contends that his claims are timely.

IV. STANDARD OF REVIEW

Upon a motion to dismiss, the Court (i) accepts all well-pleaded factual allegations as true, (ii) accepts even vague allegations as well-pleaded if they give the opposing party notice of the claim, (iii) draws all reasonable inferences in favor of the non-moving party, and (iv) only dismisses a case where the plaintiff would not be entitled to recover under any reasonably

conceivable set of circumstances.[38] However, the court must "ignore conclusory allegations that lack specific supporting factual allegations."[39]

V. DISCUSSION

A. AS PLEAD AND ARGUED, COUNT I IS NOT RIPE AND SHALL BE DISMISSED

Under Delaware law, the elements necessary for a breach of contract claim are: (i) a contractual obligation; (ii) a breach of that obligation by the defendant; and (iii) a resulting damage to the plaintiff.[40] The existence of conditions precedent "are ultimately a question of contract interpretation."[41] "[I]f the language of a contract is plain and unambiguous, a court should construe the contract according to its terms."[42] "There are no particular words that must be used in order to create a condition precedent . . . any phrase that conditions performance" suffices.[43] A condition precedent is an "act or event, other than a lapse of time, that must exist or occur before a duty to perform something promised arises."[44] Under Delaware law, "[c]onditions precedent are not favored in contract interpretation because of their tendency to work a forfeiture."[45] Parties to a contract must use unambiguous, express language to create a condition precedent capable of producing a forfeiture.[46]

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[38] *See Central Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 227 A.3d 531, 536 (Del. 2011); *Doe v. Cedars Academy*, No. 09C-09-136, 2010 WL 5825343, at *3 (Del. Super. Oct. 27, 2010).
[39] *Ramunno v. Crawley*, 705 A.2d 1029, 1034 (Del. 1998).
[40] *H-M Wexford LLC v. Encorp, Inc.*, 832 A.2d 129, 140 (Del. Ch. 2003).
[41] *Casey Emp't Servs., Inc. v. Dali*, 1993 WL 478088, at *4 (Del. Nov. 18, 1993).
[42] *AES Puerto Rico, L.P. v. Alstom Power, Inc.*, 429 F. Supp. 2d 713, 717 (D. Del. 2006) (citing 17A Am. Jur. 2d *Contracts* § 471 (1991)).
[43] *Cato Cap. LLC v. Hemispherx Biopharma, Inc.*, 70 F. Supp. 3d 607, 619 (D. Del. 2014) (interpreting Delaware law).
[44] *Condition Precedent*, BLACK'S LAW DICTIONARY (10th ed. 2014); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 224 ("A condition is an event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a contract becomes due.").
[45] *Stoltz Realty Co. v. Paul*, 1995 WL 654152, at *9 (Del. Super. Ct. Sept. 20, 1995) (quoting 17A Am. Jur. 2d *Contracts* §471).
[46] *See QC Holdings, Inc. v. Allconnect, Inc*., 2018 WL 4091721, at *7 (Del. Ch. Aug. 28, 2018) ("For a condition to effect a forfeiture, it must be unambiguous. If the language does not clearly provide for a forfeiture, then a court will construe the agreement to avoid causing one."); *see also Martin v. Hopkins*, 2006 WL 1915555, at *6 (Del. Super. Ct. June 27, 2006) (same); *Volair Contractors, Inc. v. Coastal Mech., Inc.*, 1986 WL 13982, at *1 (Del. Super. Ct.

Here, Mr. Thomas alleges that the RUA term under Separation Agreement Section 2(a) regarding payment of the Indirect Payment Amount acts as a timing provision and not a condition precedent for when payment of the Indirect Payment Amount is to be made. Mr. Thomas argues that because Mr. Sterling left the Partnership, performance of the provision is impossible; therefore, a reasonable time period should be imposed in its place. Specifically, Mr. Thomas states that the "law implies an obligation for the payor to pay the payee within a reasonable time."[47]

Mr. Thomas contends that this provision merely meant that Mr. Thomas was to be paid the Indirect Payment Amount within a reasonable time after cash was generated and that reference to the RUA was placed in the Separation Agreement as a way to define the time for that payment term. Mr. Thomas claims that the reasonable time gap filler is appropriate given the impossibility of the term involving NONPARTY's payment under RUA Section 2(d)(ii). Given this impossibility, Mr. Thomas argues that this will result in a forfeiture of nearly $[redacted] due Mr. Thomas under the Separation Agreement. Principal Holdings, however, argues that the NONPARTY Transaction is one of two conditions precedent, with just one of the two being necessary to trigger payment of the Indirect Payment Amount. Mr. Thomas has plead February 12, 2017 as that "reasonable time" for payment.[48]

The Court must read the Separation Agreement as a whole and not sections in isolation. Separation Agreement Section 2(a) notes that payment of the LP Interests Purchase Price shall be paid as set forth in Separation Agreement Sections 2(a), 2(h) and 3. Upon reading the language of Separation Agreement Section 2(a) and 2(h), the Court notes that the parties negotiated for

Dec. 1, 1986) (requiring "an unambiguous expression of intent to make receipt of payment" from a third party a condition precedent).

[47] *Id*. at ¶ 36.

[48] Id. at ¶ 26.

payment to be made either when (i) NONPARTY purchased the Class D Units while with the Partnership (*i.e.*, Separation Agreement Section 2(a)),[49] or (ii) once there is a Sale of the Partnership, if all payments had not yet been made to Mr. Thomas, then payments would be made to Plaintiff to satisfy the remaining LP Interests Purchase Price within thirty days of the Sale (Separation Agreement Section 2(h)).[50] Separation Agreement Section 3 provides for additional "special" allocations.[51]

Mr. Thomas contends that Section 2(h) is an acceleration clause and not a condition of payment. Principal Holdings contends it is the alternate way for Mr. Thomas to obtain the Indirect Payment Amount as negotiated. The Court notes that the RUA is not mentioned in Separation Agreement Section 2(h). Moreover, the Court does not find any timing or acceleration wording connected to the RUA. In other words, the Separation Agreement does not make a reference of timing/acceleration such as "…in the event that the Sale of the Partnership occurs before the sale to NONPARTY under RUA then…"

Separation Agreement Section 2(h), therefore, could be a way to accelerate payment if sale had been before consummation of the RUA; however, it also acts as a condition of payment if the RUA were terminated and the Company was sold. This ensures that Mr. Thomas receives the full LP Interests Purchase Price. Both the RUA and the sale of the Company are not certainties. As such, the parties should have foreseen the possibility that neither event would occur or would not occur until some future date and drafted different contractual language.

Both parties agree that they are sophisticated and, with respect to Count I, that the contract language is unambiguous. Therefore, Mr. Thomas should have reasonably foreseen the

[49] *See Id.* Ex. B, Section 2(a).
[50] *See Id.* Ex. B, Section 2(h).
[51] *See Id.* Ex. B, Section 3.

possibility that Mr. Sterling would leave the Partnership prior to a purchase of the Class D Units. Sophisticated parties would have foreseen this and contracted with this possibility in mind. In fact, Separation Agreement Section 2(a) provides that the outstanding amount of the Indirect Payment Amount will bear interest until paid. The parties even amended the Separation Agreement, at which time Mr. Thomas could have re-negotiated the terms of the Indirect Payment Amount. If the parties intended the Indirect Payment Amount to be paid when cash was generated by the Company, the parties should have included such language.

Additionally, it does not seem as though a forfeiture would occur because Mr. Thomas is still able to obtain the Indirect Payment Amount in the event of a Sale. It is uncertain when a Sale would occur, but it was also uncertain whether or when NONPARTY would potentially purchase any Class D Units as well. Moreover, the Separation Agreements provides that Mr. Thomas is entitled to interest if the Interim Payment Amount is delayed.

Mr. Thomas argues that there is a dispute as to the parties' intent. However, the express language of the contract seems to indicate that Mr. Thomas would receive the Indirect Payment Amount either from the NONPARTY Transaction, or from a Sale of the Partnership—times when cash would be available to satisfy the Indirect Payment Amount. Based on this information, it would seem that no breach has occurred because the Sale event in Separation Agreement Section 2(h) has not yet occurred and Mr. Thomas still has an opportunity to receive the Indirect Payment Amount.

As plead and argued, Count I is not ripe. Mr. Thomas would have the Court read in terms and conditions that only are supported by Delaware decisions—as alleged in Complaint ¶ 36—and not the express terms of the Separation Agreement. The Court finds that such arguments (reasonable time period, payment when cash is available for distributions) support

Count II—*i.e.*, there is an unanticipated gap in the Separation Agreement that frustrates the "fruits" of bargain negotiated by the parties to the Separation Agreement—and not Count I. While Count I may not survive, Count II does.

B. COUNT II, AS PLEAD, SURVIVES

To state a claim for breach of the implied covenant, a plaintiff must allege "(1) a specific implied contractual obligation; (2) breach of that obligation; and (3) resulting damage."[52] The implied covenant "is not an equitable remedy for rebalancing economic interests after events that could have been anticipated, but were not, that later adversely affected one party to a contract."[53] "The implied covenant only applies to developments that could not be anticipated, not developments that the parties failed to consider[.]"[54] "Even where the contract is silent, an interpreting court cannot use an implied covenant to re-write the agreement between the parties, and should be most chary about implying a contractual protection when the contract could easily have been drafted to expressly provide for it."[55]

The implied covenant prevents contracting parties from engaging in arbitrary or unreasonable conduct that would frustrate "the fruits of the bargain that the asserting party reasonably expected," by inferring "contract terms to handle developments or contractual gaps that the asserting party pleads neither party anticipated."[56] At the pleading stage of litigation, the trial court need only review the contract and the parties' alleged relationship to assess whether there exists an unanticipated gap in the contract's terms.[57] Furthermore, "[p]arties have a right to enter into good and bad contracts, the law enforces both."[58]

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[52] *Khusaim v. Tullow Inc.*, 2016 WL 3594752, at *3 (Del. Super. June 27, 2016).
[53] *Oxbow Carbon & Mineral Holdings, Inc. v. Crestview-Oxbow Acquisition, LLC*, 202 A.3d 482, 507 (Del. 2019).
[54] *Collab9, LLC v. En Pointe Techs. Sales, LLC*, 2019 WL 4454412, at *2 (Del. Super. Sept. 17, 2019).
[55] *Oxbow*, 202 A.3d at 507 (internal quotations omitted).
[56] *Dieckman v. Regency GP LP*, 155 A.3d 358, 367 (Del. 2017) (internal quotation marks and citation omitted).
[57] *Id.*
[58] *Nemec v. Shrader*, 991 A.2d 1120, 1126 (Del. 2010).

The Court does not find that Mr. Thomas' Count I, as set out in the Complaint and argued in the Opposition, pleads a viable cause of action. Count II is plead in the alternative and incorporates all allegations made in support of Count I. As such, to the Court, a viable Count II seems to incorporate many of the arguments made in the Opposition to support Court I. For instance, the Complaint alleges:

> Where a payment term becomes impossible due to events outside the control of the payee, the law implies an obligation for the payor to pay the payee within a reasonable time.[59]

Mr. Thomas contends that there is a "reasonable" time argument or the cash available argument in the express terms of the Separation Agreement due to the unanticipated departure of Mr. Sterling. The Court notes that these arguments support an implied covenant theory.

Principal Holdings contends that the parties could have drafted to include additional protections for Mr. Thomas, but they did not. Mr. Thomas contends he is not trying to "rebalance" the parties' economic interests as Principal Holdings suggests. Mr. Thomas argues that he objects to Principal Holdings' attempt to exploit circumstances outside of Mr. Thomas' control, such as Mr. Sterling's departure or a sale of the Company, that will deprive Mr. Thomas of the benefit of his bargain. As noted above, the parties amended the Separation Agreement to reduce the Direct Amount to be paid. While the Court cannot speculate as to the reasoning behind negotiating a decrease in the amount, it is curious that Mr. Thomas would negotiate such a deal if Mr. Thomas had not expected to be receiving the Indirect Payment Amount within a reasonable amount of time. Other than accrued interest, it appears as though only Mr. Thomas bears any risk of loss in this situation.

[59] *Id*. at ¶ 36.

Both parties note that Mr. Sterling's departure was never discussed and how Mr. Thomas should receive payment in the event Mr. Sterling left the Partnership. Mr. Thomas argues Mr. Sterling's employment was not material to the transaction. Principal Holdings argues that Mr. Sterling was material to the transaction and Mr. Sterling's departure was something the parties could have considered and anticipated. Mr. Thomas suggests that had the parties considered and anticipated the possibility of Mr. Sterling leaving the Company prior to payment of the Indirect Payment Amount, then the parties would have contracted to pay Mr. Thomas when the Company made distributions. Mr. Thomas believes Mr. Sterling's departure frustrates the bargain negotiated by the parties, whereas Principal Holdings believes it to have been a foreseeable event. Principal Holdings contends that Mr. Thomas now must wait for a Sale of the Company and that he is compensated for any delay with the payment of interest. This dispute suggests that there are factual issues that remain and need to be developed regarding the claim of a breach of the implied covenant of good faith.

The Court finds that Mr. Thomas has, at this stage of the proceedings, plead a claim for a breach of the implied covenant of good faith and fair dealing. This reasoning may seem to contradict the Court's decision as to Count I; however, Mr. Thomas plead Count II in the alternative. The Court reads the Complaint, in its entirety, as asserting one cause of action—breach of the implied covenant of good faith and fair dealing. Mr. Thomas made "implied covenant" arguments when trying to save Count I. The Court does not find those plausible to support the claim in Count I. Given what Mr. Thomas argues should be implied into the Separation Agreement, however, the Court finds that Count II is adequately plead. The focus of the parties in this civil litigation should be on this cause of action and not torturing the language of the various agreements to fit legal arguments.

C. THE RECORD NEEDS DEVELOPING ON WHETHER THE STATUTE OF LIMITATIONS HAS RUN ON COUNT II.

Under Delaware law, claims for breach of contract have a three-year statute of limitations period.[60] The statute begins to run when the injury occurs or when the contract has been breached, even if the "plaintiff is ignorant of the wrong."[61] The statute of limitations is "harsh and strict" and when the facts pled in the complaint show that the claim was "initiated outside the statute of limitations, the plaintiff bears the burden of pleading facts from which application of a recognized tolling doctrine can be reasonably inferred."[62]

Principal Holdings argues that the applicable statute of limitations runs under Mr. Thomas' claim when Mr. Sterling left. Mr. Thomas would argue that the Separation Agreement provides Principal Holdings to pay the Indirect Payment Amount within a reasonable time. The Court has held, above, that Count I is not yet ripe. As such, no limitations period has run.

The statute of limitations argument must still be addressed in terms of Count II—the claim for a breach of the implied covenant of good faith and fair dealing. Mr. Thomas believes the alleged breach occurred when Principal Holdings refused to make any payments for the Indirect Payment Amount in February of 2017 when Mr. Thomas sent a demand for payment. Principal Holdings, however, contends that any alleged breach would have occurred when Mr. Sterling departed the Company in 2015. As plead, 2015 is not the applicable date. Count II is an implied covenant claim and the covenant to be implied is a "reasonable time." Mr. Thomas

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[60] 10 *Del. C.* § 8106 ("[N]o action based on a promise . . . shall be brought after the expiration of 3 years from the accruing of the cause of action").
[61] *Welenc v. Univ. of Del.*, 2017 WL 5665652, at *3 (Del. Super. Nov. 20, 2017).
[62] *Trustwave Holdings, Inc. v. Beazley Ins. Co., Inc.*, 2019 WL 4785866, at *4 (Del. Super. Sept. 30, 2019); *see also Yaw v. Talley*, 1994 WL 89019, at *5–6 (Del. Ch. Mar. 2, 1994) (dismissing complaint on a motion to dismiss for failure to allege facts showing fraudulent concealment or that the alleged injury was inherently unknowable in order to toll the statute of limitations).

contends that February 13, 2017 is the applicable date. It may be demonstrated in discovery that some sooner date applies.

The Court finds that factual questions remain regarding when any alleged breach of the implied covenant of good faith and fair dealing may have occurred. There is not enough information at this time to effectively determine when any alleged breach may have occurred.

VI. CONCLUSION

For the reasons set forth above, the Court **DENIES IN PART AND GRANTS IN PART** the Motion. The Court holds that (i) the Complaint fails to state a claim upon which relief can be granted on Count I; and (ii) the Complaint pleads a viable claim for breach of the implied covenant of good faith and fair dealing in Count II.

Dated: September 22, 2020
Wilmington, Delaware

/s/ Eric M. Davis
Eric M. Davis, Judge

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